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# In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## QUESTION PRESENTED

Whether the management-appointed trustee of a jointly administered multiemployer trust fund established under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 19 U.S.C. 186(c)(5), is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B).

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 614 F.2d 872. The decision and order of the National Labor Relations Board (Pet. App. 43a-227a) are reported at 238 N.L.R.B. 1583.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-40a) was entered on April 3, 1980. A petition for rehearing was denied on May 29, 1980 (Pet. App.

[1] "Pet. App." refers to the appendix to the petition in No. 80-692.

41a-42a). The petition for a writ of certiorari in No. 80-289 was filed on August 26, 1980. On September 18, 1980, Justice Brennan extended the time within which a petition for a writ of certiorari could be filed until October 26, 1980 (a Sunday), and the petition in No. 80-692 was filed on October 27, 1980. Both petitions were granted on January 19, 1981 (A. 298-299).[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*; the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, are set forth at Pet. App. 228a-255a.

## STATEMENT

### A. The Federal Regulation Of Pension And Other Welfare Funds

1. In 1947, Congress first began to regulate pension and other welfare funds. Although Section 302 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186, generally prohibits employer payments to any representative of his employees, Section 302(c)(5), 29 U.S.C. 186(c)(5), permits employer contributions to a welfare trust fund provided that the fund satisfies various requirements. For example, qualifying welfare funds must be in the form of a trust. See 29 U.S.C. 186(c)(5)(A). The fund can provide only certain types of benefits

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[2] The grant in No. 80-289 was limited to Question 1, which is the same question presented by the petition in No. 80-692.

for employees and their families and dependents,[3] and the basis for such payments must be specified in a written, detailed agreement with the employer. See 29 U.S.C. 186(c)(5)(A) and (B). The fund must also be audited annually, and the results of the audit must be made available to all interested persons. 29 U.S.C. 186(c)(5)(B). Furthermore, pension or annuity funds are to be kept in a trust separate from other welfare funds. 29 U.S.C. 186(c)(5)(C).

In addition to these requirements, Section 302(c)(5)(B) directs that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon * * *." 29 U.S.C. 186(c)(5)(B). Thus, the employees and the employers are required to select an equal number of trustees for such funds, and may jointly agree upon any number of other persons as trustees. If the trustees of the fund deadlock, Section 302(c)(5)(B) further provides that the trustees may select a neutral arbiter or "in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office * * *." 29 U.S.C. 186(c)(5)(B).

2. In 1974, Congress enacted a more comprehensive scheme of pension and welfare fund regulation.

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[3] The trust funds are limited to paying "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. 186(c)(5)(A).

The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, codified at 29 U.S.C. 1001 *et seq.*, sets forth detailed requirements concerning the creation, administration, and termination of pension and welfare funds. See generally *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In particular, Part 4 of Title I of ERISA (29 U.S.C. 1101 *et seq.*) imposes various duties and restrictions on the trustees of such pension funds, and limits or prohibits certain types of transactions.

Thus, Section 403(a) of ERISA requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees * * * and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan * * *." 29 U.S.C. 1103(a). Section 403(c)(1) further provides that, with certain limited exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1).

Moreover, Section 404(a)(1) establishes a prudent man standard of care for all trust fiduciaries, and requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). Section 406(b)(2) prohibits a trustee from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Sections 406(a)(1)(E) and 407

limit the amount and kinds of employer property and securities that a trust may acquire. See 29 U.S.C. 1106(a)(1)(E) and 1107.

3. Recognizing that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans" (Section 3(a)(3) of the Multiemployer Pension Plan Amendments Act of 1980 ("1980 Act"), Pub. L. No. 96-364, 94 Stat. 1209), Congress amended ERISA in 1980 specifically to address the special problems of multiemployer trust funds. Because "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations" (Section 3(a)(4)(A) of the 1980 Act, 94 Stat. 1209), Congress established a comprehensive statutory scheme regarding the withdrawal from and termination of multiemployer pension plans. In particular, Congress determined to eliminate an employer's financial incentive to withdraw from a multiemployer plan by requiring a withdrawing employer to continue funding a proportional share of the plan's unfunded benefit obligations. See Section 104 of the 1980 Act, 94 Stat. 1217; H.R. Rep. No. 96-869, 96th Cong., 2d Sess., Part I, at 51-55, 65-70, 73-90 and Part II, at 4-7, 10-11, 14-31, 42 (1980).

### B. Proceedings Below

1. Amax Coal Company, a division of Amax, Inc., is in the business of mining coal, primarily in deep shaft bituminous mines located in the midwestern United States. It bargains with the United Mine Workers of America ("the Union") for its midwestern mines as a member of the Bituminous Coal

Operators Association ("BCOA"), a nationwide multiemployer group. In 1972, Amax opened the Belle Ayr Mine in Wyoming, its first sub-bituminous surface mine. Although that mine, like most western surface mines, did not become a member of BCOA, Amax and the Union agreed to a contract regarding the Belle Ayr Mine, which was patterned after the BCOA national contract. Pursuant to this contract, Amax contributed specified amounts to the Union's national pension and welfare trust funds (Pet. App. 3a, 76a-79a; A. 25, 33-34, 42-43, 49, 75).

In January 1975, after the western surface mine contracts, including the Belle Ayr Mine contract, had expired,[4] the Union struck the Belle Ayr Mine and other employers. Amax resisted the Union's attempts to compel establishment of a multiemployer bargaining group,[5] and, in February 1975, the Union, after learning that the Board's Regional Director was preparing to issue a complaint, began separate negotiations with Amax regarding the Belle Ayr Mine. These negotiations were unproductive, however, and by mid-March 1975, the parties had reached an impasse on several points. During the week of March 17, 1975, Amax resumed operations at the Belle Ayr Mine under the terms of its last contract offer. Al-

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[4] These contracts, like the BCOA national contract, were originally scheduled to expire on November 12, 1974, but they had been extended for two months (Pet. App. 3a-4a, 46a-48a, 80a-84a; A. 99).

[5] The Board found that, insofar as the strike was designed to compel Amax to bargain through a multiemployer group, the Union had violated Sections 8(b)(1)(B) and 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) and 158(b)(4)(A). See Pet. App. 45a-56a. The court of appeals affirmed this finding (Pet. App. 7a-12a), which is not before this Court.

though sporadic negotiations occurred during the next year, no agreement was ever reached (Pet. App. 3a-7a, 46a-51a, 80a-125a; A. 38-42, 49-54, 58-63, 224-226).

In particular, Amax would not agree to continue making its pension and welfare contributions to the Union's existing national trust funds. These funds provide comprehensive health and retirement benefits to coal miners and their families. In accordance with Section 302(c)(5)(B) of the LMRA, three trustees administer the funds: one trustee selected by management, one trustee selected by the Union, and one trustee jointly selected by the other trustees. See 29 U.S.C. 186(c)(5)(B); page 3, *supra*. At the time of the Belle Ayr negotiations, the three trustees of the national funds had been chosen and were administering the funds. Amax had participated in the prior selection of the management-appointed trustee through its membership in the BCOA. It claimed the sole right to appoint its own trustee, however, with regard to any trust fund covering the employees of the Belle Ayr mine, which was not part of the BCOA bargaining unit (Pet. App. 57a, 135a-137a & n.48; A. 34-35, 37-39, 47, 49-50, 52-54, 272-273).

The collective bargaining agreement sets the level of employer contributions to the particular trust fund. The trust documents, in turn, establish the amount and eligibility requirements for each category of benefit, and the amount of employer contributions to be allocated to each class of beneficiary. Within this framework, the trustees exercise significant discretion regarding the assets of the trust and administration of the fund, including the determination of eligibility for benefits, the approval of insurance carriers, and the investigation of insurance claims. In addition, the trustees have the authority to decide

whether an employer has failed to make a required contribution and, where appropriate, to pursue legal remedies against the employer on behalf of the beneficiaries. The trustees also have the power to reduce or suspend the payment of benefits if there is a shortfall in fund assets, and may propose amendments to the trust instruments for the consideration of the employers and the Union (Pet. App. 57a-58a, 135a-137a; A. 97-98x, 241-269, 274-277).

2. The Board unanimously concluded that the Union did not violate Sections 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B) and 158(b)(3), by bargaining to impasse and striking in support of its proposal that Amax continue to contribute to the Union's existing national pension and welfare trust funds with regard to the Belle Ayr employees. The Board observed that proposals concerning employer contributions to employee benefits funds are unquestionably mandatory subjects of bargaining (Pet. App. 58a). The Board rejected Amax's claim that, notwithstanding the otherwise mandatory nature of the Union's trust fund proposal, the Union's insistence on an existing trust fund was unlawful, because it coerced Amax in its selection of a collective-bargaining representative by forcing it to accept the previously selected management-appointed trustee of the Union's existing multiemployer trust fund. Affirming in relevant part the decision of the administrative law judge, the Board held that "the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act" (Pet. App. 57a).

The Board explained that the trustees of a jointly administered, multiemployer trust fund are not collective-bargaining representatives because such trus-

tees "are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan" (Pet. App. 58a). This distinction had been fully explicated in the Board's prior decision in *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978), petition for review pending *sub nom. Central Florida Sheet Metal Contractors Ass'n* v. *NLRB*, No. 79-2396 (5th Cir.) (cited with approval at Pet. App. 58a-59a):

> [W]e conclude that the * * * trustees are not collective-bargaining representatives within the meaning of Section 8(b)(1)(B) of the [NLRA]. In arriving at this conclusion, we note first that, by insulating an employer from union interference in the selection process, Section 8(b)(1)(B) ensures that an employer may bargain through a freely chosen representative that is completely faithful to his interests. Indeed, an individual or entity that possesses duly delegated authority to act as a bargaining agent must, in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of his appointing party. * * * [H]owever, the trustees of a joint trust fund * * * are required to act solely in the interests of the beneficiaries of the trust fund. The fiduciary obligations imposed on the trustees are of overriding importance, and, although they should, of course, carefully consider all recommendations submitted by the parties who have appointed them, the trustees are bound to exercise their independent judgment when making decisions with respect to the administration of the trust fund. We therefore conclude, in agreement with the weight of judicial precedent on this issue, that there is nothing in either the statute or its underlying legislative history to support the contention that Congress intended that trust funds established

> pursuant to Section 302(c)(5) [of the LMRA] are to deviate from the established principle of trust law that a trustee must always act in a manner that operates solely to the advantage of the beneficiaries.

234 N.L.R.B. at 1248 (footnote omitted).[6]

Since the trustees of a fund established under Section 302(c)(5) of the LMRA are not collective-bargaining representatives, the Union's demand that Amax contribute to the existing trust funds did not restrain or coerce Amax in violation of Section 8(b)(1)(B) of the NLRA, even though the management trustee of the fund had previously been selected. And, since the Union's proposal otherwise concerned a mandatory subject of bargaining (see *Sheet Metal Workers'*, *supra*, 234 N.L.R.B. at 1243-1245), the Union's bargaining to impasse and striking over the welfare and pension fund issue did not run afoul of its obligation to bargain under Section 8(b)(3). Accordingly, the Board dismissed this portion of the complaint (Pet. App. 59a).

The Board further concluded that the Union did not violate Section 8(b)(3) of the NLRA by bargaining in bad faith, after the commencement of the separate Belle Ayr negotiations in February 1975 (Pet. App. 44a n.3, 203a-213a). The administrative law judge, affirmed by the Board, found that "[t]he record does not establish that the UMWA [bargained] * * * with a closed mind or from a fixed inflexible

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[6] The Secretary of Labor filed an amicus curiae brief in both this case and in *Sheet Metal Workers'* expressing the view that "the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective-bargaining representative" (234 N.L.R.B. at 1246). The Secretary also concurs in this brief, which reflects the joint views of the Board and the Secretary.

position or was rigidly unwilling to consider seriously any possible alternatives to [its proposals]" (*id.* at 205a). The ALJ noted that "[t]he fact that the UMWA violated the Act by insisting to impasse that Amax agree to contract provisions containing nonmandatory and illegal bargaining subjects, and further violated the Act by striking Amax for an object of securing a contract which included illegal provisions, does not support an inference that the UMWA was engaged in overall bad-faith bargaining" (*id.* at 209a).[7] He therefore concluded (*id.* at 213a; emphasis in original & footnote omitted):

> Based on the foregoing, and the entire record, I find that the UMWA's bargaining stance and conduct, *considered in its totality*, does not establish a case of overall bad-faith bargaining. Accordingly, I shall recommend that this portion of the complaint be dismissed.

3. On appeal, a two-judge panel of the court of appeals reversed in part.[8] The court agreed with the Board that the Union had not bargained in bad faith

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[7] As noted above (note 5, *supra*), the Board found that the Union violated the NLRA by attempting to coerce Amax into joining a new multiemployer bargaining group being formed by several other western surface mines, and it further found, *inter alia*, that the Union violated the NLRA by failing to notify properly the Federal Mediation and Conciliation Service of its dispute with Amax before striking, and by insisting to impasse upon several contract clause proposals that would have violated Section 8(e) of the NLRA, 29 U.S.C. 158(e) (Pet. App. 127a-128a, 176a-199a). The court of appeals affirmed these findings (Pet. App. 7a-12a, 24a-30a), and they are not before this Court.

[8] Although Judge Gibbons heard oral argument in this case in the court of appeals, he did not participate in the decision. See Pet. App. 1a n.*.

(Pet. App. 30a). But it rejected the Board's determination regarding the status of management-appointed trustees of a joint trust fund and held that such trustees are collective-bargaining representatives covered by Section 8(b)(1)(B) of the NLRA. Relying on its prior decision in *Associated Contractors of Essex County, Inc.* v. *Laborers International Union*, 559 F.2d 222, 227-228 (3d Cir. 1977), the court stated (Pet. App. 13a):

> Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them.

The court of appeals accordingly concluded that the Union had coerced Amax in its selection of a collective-bargaining representative and had unlawfully refused to bargain insofar as the Union had insisted on its proposal that Amax continue to contribute to the Union's existing national trust funds whose trustees had previously been selected (*id.* at 14a). Because, in the court's view, the Union's behavior thus violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA, the court ordered the Union to cease and desist from "insisting to the point of impasse that Amax * * * participate in the [Union's] multiemployer pension and welfare funds" (Pet. App. 36a).

## SUMMARY OF ARGUMENT

This case concerns the proper characterization of a management or union appointed trustee of a jointly-administered, multiemployer trust fund established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186(c)(5). Rejecting the concurrent views of the National Labor Relations Board and the Secretary of Labor, the court of appeals has held that such trustees represent the party that appoints them (*i.e.*, the employer or the union), as well as the beneficiaries of the trust fund, and that therefore a management-appointed trustee is a management collective-bargaining representative within the scope of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B). As a result, a union cannot bargain to impasse and strike about employer contributions to existing multiemployer trust funds, even though the use and continuity of such trust funds is often critical to the portability and stability of employee health and pension benefits. In other words, under the court of appeals' ruling, an employer need not discuss or bargain about an important term or condition of employment, but rather may unilaterally insist upon contributing to a single-employer trust fund. Nothing in the language or history of the federal labor laws supports this illogical result.

The court of appeals' unprecedented ruling rests on the erroneous premise that, following his appointment, a trustee of a jointly-administered trust fund continues to represent the appointing party. Under well settled common law principles, however, a trustee owes an exclusive duty of loyalty to the beneficiaries of the trust and may not act to further the interests

of other parties. The court of appeals nonetheless concluded that Section 302(c)(5)(B) of the LMRA, which provides that "employees and employers [be] equally represented in the administration of such fund[s]" (29 U.S.C. 186(c)(5)(B)), abrogates this common law standard. But although Section 302(c)(5)(B) thus requires an equal balance between the number of trustees appointed by the employers and those appointed by the union, it does not indicate that a trustee once appointed represents the party that appointed him. To the contrary, the language of Section 302(c)(5) as a whole and its legislative history show that Congress intended these funds to be created as formal trusts and to be administered strictly on behalf of the trust beneficiaries. In short, Section 302(c)(5) incorporates rather than abrogates the applicable common law fiduciary standards.

Part 4 of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1101 *et seq.*, resolves any possible doubt on this point. Thus, Section 404(a)(1) of ERISA requires that a trustee "discharge his duties * * * *solely* in the interest of the [trust] participants and beneficiaries and * * * for the *exclusive* purpose of * * * providing benefits to participants and their beneficiaries * * *." 29 U.S.C. 1104(a)(1) (emphasis supplied). In addition, Section 406(b)(2) provides that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Section 403(c)(1) specifically declares that except upon termination of a fund or unless necessary to correct an overpayment by an employer to the fund, "the assets of a plan

shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1).

The conclusion of the court of appeals that a management-appointed trustee owes his loyalty both to the trust beneficiaries and to management is thus wholly at odds with the plain meaning of ERISA. As the House Conference Report explains, ERISA imposes "rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries" (H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 295 (1974)), and is designed to "prevent[] a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries" (*id.* at 309). Moreover, in amending ERISA in 1980, Congress reaffirmed that trustees must act solely on behalf of the trust beneficiaries and participants, and it expressly condemned the decision of the court of appeals in this case. 126 Cong. Rec. S10104 (daily ed. July 29, 1980) (colloquy between Sens. Randolph and Williams); 126 Cong. Rec. H7902 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). See H.R. Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. 67 (1980).

We further submit that, even if a management-appointed trustee could be thought to owe a residual duty to represent the employer that appointed him, the court of appeals erroneously characterized such trustees as collective bargaining representatives within the meaning of Section 8(b)(1)(B). "Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional

concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." *Florida Power & Light Co.* v. *IBEW, Local 641*, 417 U.S. 790, 803 (1974). Thus, Congress enacted Section 8(b)(1)(B) merely to ensure the undivided loyalty of an employer's freely chosen representatives while engaged in collective bargaining and grievance adjustment. See 417 U.S. at 803-805; *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 422-423, 429-431, 435-436 (1978).

In contrast, a trustee is primarily, if not exclusively, loyal to the beneficiaries of the trust. Indeed, a trustee must represent the beneficiaries of the trust against management if the employer fails to make required contributions. Furthermore, a trustee neither engages in collective bargaining nor adjusts grievances under the collective bargaining agreement. Rather, he administers a trust fund, which is a separate document from the collective bargaining agreement, and he manages the fund assets and resolves disputes between the trust fund and its beneficiaries, who may or may not be employees. In short, a trustee is simply not a collective bargaining representative. Accord, *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971); *United States* v. *Ryan*, 350 U.S. 299, 305 (1956); *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976); *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975); *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967).

## ARGUMENT

### THE MANAGEMENT-APPOINTED TRUSTEE OF A JOINTLY ADMINISTERED MULTIEMPLOYER TRUST FUND ESTABLISHED UNDER SECTION 302(c)(5) OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 IS NOT A COLLECTIVE BARGAINING REPRESENTATIVE WITHIN THE MEANING OF SECTION 8(b)(1)(B) OF THE NATIONAL LABOR RELATIONS ACT

At issue in this case is whether a union may bargain to impasse and strike with regard to its proposal that an employer contribute to an existing multiemployer pension or welfare fund.[9] Such multiemployer funds often provide a more secure and effective means of administering the employees' fringe

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[9] Amax erroneously suggests (Br. in Opp. 7-10) that the court of appeals held that the Union bargained in bad faith about the multiemployer pension and welfare fund issue. To the contrary, the court of appeals expressly affirmed the Board's finding that, after the commencement of separate negotiations in February 1975, the Union bargained in good faith. See Pet. App. 30a, 44a n.3, 203a-213a. This Court should not review these concurrent factual determinations. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952).

Amax also incorrectly contends (Br. in Opp. 10) that this case involves the Union's right to "force" an employer to participate in a multiemployer fund. Even if, as we submit, a Union may bargain to impasse with regard to the multiemployer pension fund issue, an employer can, of course, bargain for a single-employer plan and refuse to accede to the Union's proposals—rights that Amax effectively exercised in this case. See also *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 495 (1960) ("the use of economic pressure by the parties to a labor dispute * * * is part and parcel of the process of collective bargaining").

benefits than do single-employer funds.[10] In addition to the "obvious advantages * * * of economies of scale in administrative costs and investments" (*Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, 586 F.2d 1367, 1375 (10th Cir. 1978)), multiemployer funds "have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 25 (1974). Furthermore, particularly in industries such as construction or entertainment, where employees typically do not work continuously for one employer, a multiemployer fund will often be the only means of ensuring that an employee can continuously accumulate retirement credits and enjoy continuity of benefits. See, *e.g.*, *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, *supra*, 586 F.2d at 1371, 1375; H.R. Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. 53 (1980). In sum, as Congress expressly recognized in the preamble to the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, Section 3(a)(3) and (4)(A), 94 Stat. 1209, "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans" and

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[10] Multiemployer pension plans cover more than 8.8 million employees and pensioners, and total more than $22.7 billion in assets. See Department of Labor, *Pension and Welfare Benefit Programs: Study of Multi-Employer Plans* I-2, I-10, IV-5 (1979) (based on 1975 figures). The number and size of multiemployer funds is growing. See *id.* at I-15 (predicting more than 16 million covered employees by 2000); H.R. Rep. No. 96-869 (Part 1), 96th Cong., 2d Sess. 51-57 (1980).

employer participation in and "withdrawal[] * * * from a multiemployer pension plan * * * affect[s] the plan, its participants and beneficiaries, and labor-management relations." [11]

The court of appeals nonetheless concluded that the Union in this case could not lawfully bargain to impasse and strike with regard to its important multiemployer pension fund proposal. The court reasoned that Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B), which provides that a union may not coerce an employer in its choice of collective bargaining representative, bars a union from bargaining to impasse about employer contributions to an existing multiemployer fund that is administered by previously appointed trustees. In the court of appeals' view, a management-appointed trustee of a fund established in accordance with Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186(c)(5), is a collective bargaining repre-

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[11] Because the issue whether an employer contributes to a multiemployer plan directly affects the reliability and availability of employee fringe benefits, a union proposal regarding contributions to a multiemployer plan concerns "wages, hours, and other terms and conditions of employment," and is thus subject to a mandatory bargaining obligation under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d). See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 498, 500-501, 503 n.15 (1979); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593 (1977); *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180-181 (1971). Neither the court of appeals nor Amax has suggested that the Union's proposal in this case does not fall within the scope of Section 8(d). Rather, as discussed *infra*, the contention made is that Section 8(b)(1)(B) of the NLRA constitutes an independent bar to the Union's proposal regarding Amax's continued contributions to existing multiemployer funds.

sentative for purposes of Section 8(b)(1)(B). Accordingly, the court of appeals held that the Union's proposal that Amax continue contributing to the miners' existing multiemployer funds unlawfully circumscribed Amax's unfettered discretion to choose its collective bargaining representative (*i.e.*, the management-appointed trustee), in violation of Section 8(b)(1)(B).[12]

As we now demonstrate, the court of appeals' analysis is egregiously flawed in two respects. First, following his appointment, a trustee ceases to represent the interests of the party that appointed him. Both the common law, which was incorporated and not abrogated by the LMRA, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, require that a trustee administer a trust fund solely on behalf of the trust bene-

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[12] Where, as here, the union proposes that an employer contribute to an existing multiemployer fund that is administered by previously appointed trustees, the union is obviously unable to negotiate with the employer about the structure of the plan or the selection of its trustees. In such circumstances, the Board has determined that, since the acceptance of the named trustees is an inseparable part of the proposal to participate in the fund at all, the entire proposal, including the request to accept the previously designated trustees, is a mandatory subject of bargaining. *Sheet Metal Workers', supra*, 234 N.L.R.B. at 1244; *United Slate, Tile & Composition Roofers, Local No. 220 (Jones and Jones, Inc.)*, 177 N.L.R.B. 632, 651 (1969). In other contexts, however, where the proposal would not affect the benefits provided to employees, a union proposal designed to influence the employer's selection of a management-appointed trustee would not be a mandatory bargaining subject. See *NLRB* v. *Local 964, United Brotherhood of Carpenters and Joiners*, 447 F.2d 643, 646 (2d Cir. 1971). See also *Keystone Steel & Wire Division* v. *NLRB*, 606 F.2d 171, 178-179 (7th Cir. 1979).

ficiaries. Thus, a trustee may not represent or otherwise act on behalf of an employer at all. See Point A, *infra*. Moreover, even if a management-appointed trustee could in some sense represent an employer, the court of appeals erroneously concluded that a trustee is a collective bargaining representative within the narrow scope of Section 8(b)(1)(B). As we show in Point B, *infra*, a trustee does not negotiate collective bargaining agreements or supervise day-to-day employer-employee relations, but rather administers the relationship between trust beneficiaries, who may or may not be employees, and the fund.

**A. A Management-Appointed Trustee Of A Pension Or Welfare Fund Owes His Sole And Exclusive Duty Of Loyalty To The Fund Beneficiaries**

1. *The Common Law.* The court below held that the trustee of a trust fund established pursuant to Section 302(c)(5) of the LMRA represents both the party that appointed him and the beneficiaries of the fund. Under common law principles, however, a trustee has an unwavering duty to "display throughout the administration of the trust complete loyalty to the interests of the beneficiary, and [to] exclude all selfish interests and all consideration of the interests of third persons." G. Bogert, *Trusts and Trustees* § 543 (rev. 2d ed. 1978). See *Restatement (Second) of Trusts* § 170(1) (1959); II *Scott on Trusts* § 170 (3d ed. 1967); Scott, *The Fiduciary Principle*, 37 Calif. L. Rev. 539 (1949). Thus, regardless of the actual injury to the trust beneficiaries, it is well settled that a trustee may not administer a trust for the financial benefit of himself, of the trust settlor (*i.e.*, the employer and the union), or of any other third person. See G. Bogert, *supra*, at § 543. *Restatement (Second) of Trusts* § 170, comment q

(1959) ("The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person"); *In re Bond and Mortgage Guarantee Co.*, 303 N.Y. 423, 103 N.E.2d 721 (1952); *In re Hubbell*, 302 N.Y. 246, 97 N.E.2d 888 (1951); *Lipic* v. *Wheeler*, 362 Mo. 499, 242 S.W.2d 43 (1951). Moreover, in order to insulate the trustee from all temptation and to deter any injury to the beneficiaries, the rule against dual loyalties has been enforced with "[u]ncompromising rigidity." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.). See, *e.g.*, G. Bogert, *supra*, at § 543.

The court of appeals' view (Pet. App. 13a; see Amax Br. in Opp. 15) that fund trustees may nonetheless advance the interest of the party that appointed them "[i]nsofar as it is consistent with their fiduciary obligations" to the trust beneficiaries is thus wholly at odds with the basic thrust of fiduciary law. As this Court explained in *Woods* v. *City National Bank and Trust Co.*, 312 U.S. 262, 268 (1941), any potential conflict of interest may serve "to dilute the undivided loyalty" of the trustee in a manner that "can seldom be measured with any degree of certainty." Accordingly, a fiduciary may not be heard to contend "that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one." *Id.* at 269.[13] See also, *e.g.*, *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951); *In re Bond and Mortgage Guarantee Co.*, *supra*, 303

[13] In *Woods*, the Court concluded that the trustees who breached their duty of exclusive loyalty were not entitled to compensation for the services rendered to the bankrupt estate regardless of whether any unfairness had resulted. 312 U.S. at 268.

N.Y. at 430-431, 103 N.E.2d at 725; *Cutaiar* v. *Marshall*, 590 F.2d 523 (3d Cir. 1979); *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1094 (D.D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975).

We submit that Amax's statutory contentions regarding the proper role of pension and welfare fund trustees must be measured against this common law background. In light of the well established rule against dual loyalties, the court of appeals should not have concluded that the LMRA fundamentally alters the common law of fiduciary loyalty unless Congress has unequivocally evidenced its intent to do so. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980); *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). However, as we now demonstrate, Congress has expressly determined that all welfare and pension trusts, including those covered by Section 302(c)(5) of the LMRA, shall be administered in accordance with strict fiduciary principles. In short, Congress has adopted rather than abrogated the common law prohibition against dual loyalties.

2. *The LMRA.* The court of appeals' decision rests on Section 302(c)(5)(B) of the LMRA, which provides that "employees and employers [be] equally represented in the administration of such [pension and welfare] fund[s]." 29 U.S.C. 186(c)(5)(B). Although that statute requires an equal balance between the trustees appointed by the employers and those designated by the union, nothing in the language of Section 302(c)(5) indicates that Congress intended that a trustee should in any degree administer a trust fund on behalf of the party that appointed him. To the contrary, Section 302(c)(5) as a whole is "designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the

duty of undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle, supra,* 329 F. Supp. at 1095. See *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3, supra,* 586 F.2d at 1373-1375. For example, Congress directed that such funds be established as a written, formal trust, and that the assets of the fund be "held in trust" "for the *sole* and *exclusive* benefit of the employees * * * and their families and dependents." 29 U.S.C. 186(c)(5) (emphasis supplied).[14] At the same time, the LMRA does not explicitly empower an employer to direct or supervise a trustee's decisions or to remove a management-appointed trustee who does not satisfactorily represent the employer's interests. See *Toensing* v. *Brown,* 528 F.2d 69, 72 (9th Cir. 1975); *Lamb* v. *Carey,* 498 F.2d 789, 793-794 (D.C. Cir. 1974).

The legislative history of the LMRA confirms that "the sole purpose" of Section 302(c)(5) is to ensure that employee pension and "welfare funds * * * are legitimate trust funds, used actually for the specified benefits to the employees." 93 Cong. Rec. 4678 (1947) (remarks of Sen. Ball), *reprinted in* II NLRB, *Legislative History of the Labor Management Relations Act, 1947,* at 1305 (1948) (hereinafter "*Leg. Hist. LMRA*"). As Senator Ball, the sponsor of Section

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[14] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States,* 342 U.S. 246, 263 (1952). Accordingly, the terms "trust" and "sole and exclusive benefit" should be given their ordinary, common law meaning and significance. See also, *e.g., Perrin* v. *United States,* 444 U.S. 37, 42 (1979).

302(c)(5), explained, "all we seek to do by the amendment [Section 302(c)(5)] is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947), *reprinted in* II *Leg. Hist. LMRA* 1332.[15] See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 29, 78-79 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67 (1947); 93 Cong. Rec. 3565 (1947) (remarks of Rep. Case); II *Leg. Hist. LMRA* 1304, 1310-1312, 1321-1322.

The congressional debates further indicate that Congress purposefully directed that employee pension and welfare plans be cast in the traditional trust form precisely because the strict common law fiduciary requirements governing the administration of trusts would best protect the employee beneficiaries. Thus, an opponent of the bill suggested that Section 302(c)(5) was unnecessary because, even without that provision, the "officials who administer [the funds] thereby become trustees, subject to all of the common law and State safeguards against misuse of funds by trustees." II *Leg. Hist. LMRA* 1318 (remarks of Sen. Morse). Senator Taft, the primary author of the LMRA, responded that many existing funds were not currently

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[15] Section 302(c)(5) was a Senate-sponsored amendment to the 1947 bill that was patterned after a similar section in the Case bill (the 1946 version of the LMRA), which had passed Congress but was vetoed by the President. See II *Leg. Hist. LMRA* 1305, 1310 (remarks of Sens. Byrd, Pepper, and Taft); S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 52 (1947). A similar proposal was originally defeated in the House, but was agreed to in conference. See II *Leg. Hist. LMRA* 749-757, 782.

established as trusts and that the requirement in Section 302(c)(5) that each fund be a specific and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a "court of chancery." II *Leg. Hist. LMRA* 1322. See *ibid.* (remarks of Sen. Ball). In sum, Section 302(c)(5) was designed "to prevent the abuse of welfare funds" by "requir[ing] that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them." 93 Cong. Rec. 4747 (1947) (remarks of Sen. Taft), *reprinted in* II *Leg. Hist. LMRA* 1312. See also S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 52 (1947) (Section 302(c)(5) "requires * * * such funds * * * be, in fact, trust funds for the employees"); I *Leg. Hist. LMRA* 753, 873; II *Leg. Hist. LMRA* 1498, 1524.

The legislative history also reflects congressional concern about the breach of fiduciary duties by union trustees, including the appropriation of trust assets for a union "war chest." II *Leg. Hist. LMRA* 1312 (remarks of Sen. Taft). See *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959); *United States* v. *Ryan*, 350 U.S. 299, 304-307 (1956); *Blankenship* v. *Boyle*, *supra*, 329 F. Supp. at 1094-1095. Contemplating that independent employer-appointed trustees would constitute an additional check against union misuse of employee funds, Congress required that there be an equal balance between the trustees appointed by the union and those appointed by the employers. Nowhere, however, did Congress express the view either that each participating employer had the right to select a trustee or that management-appointed trustees should further the interests of the appointing employers. See *Denver Metropolitan Ass'n of Plumb-*

*ing Contractors* v. *Journeyman Plumbers Local No. 3, supra*, 586 F.2d at 1373-1375; *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72-73 (8th Cir. 1965); *Local 169, Teamsters* v. *Teamsters Health and Welfare Fund*, 327 F. Supp. 260, 264 (E.D. Pa. 1971).[16]

Moreover, since the sole purpose of Section 302 (c)(5) is to "protect[] the rights of the employees whose toil creates these welfare funds" (II *Leg. Hist. LMRA* 1524 (remarks of Sen. Ball)), it is inconceivable that Congress silently sought to impose a dual loyalty standard on the fund trustees, thereby diluting the common law protections theretofore enjoyed by trust beneficiaries. Likewise, the court of appeals' construction of Section 302(c)(5) would un-

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[16] In fact, the only even arguable indication that Congress may have considered that Section 302(c)(5) was meant to protect any interest of the employers is an isolated statement by Senator Wiley made after the amendment constituting Section 302(c)(5) had passed the Senate. Senator Wiley stated that he understood Section 302(c)(5) to "giv[e] employers their rightful voice in the administration of union welfare funds and [to] limit[] the uses for which the money may be spent." II *Leg. Hist. LMRA* 1471. But Senator Wiley had previously observed that he had "refrained thus far from expressing my views on the measure, largely because I am not a member of the Senate Labor and Public Welfare Committee and did not have the opportunity to examine in the closest detail all of the provisions of the bill" and that his remarks were only "some general thoughts in summary on the nature of this legislation." II *Leg. Hist. LMRA* 1469. Given the repeated statements of Senators Ball and Taft, the sponsors of Section 302(c)(5), that the sole purpose of Section 302(c)(5) was to protect the interests of the employee-beneficiaries (see, *e.g.*, II *Leg. Hist. LMRA* 1305, 1310-1312, 1321, 1322, 1498, 1524), Senator Wiley's off-hand comment is entitled to no weight.

dermine Congress' evident intent to eradicate union manipulation and abuse of welfare funds and "to isolate such welfare funds from labor-management politics." *Blankenship* v. *Boyle, supra*, 329 F. Supp. at 1094. See 93 Cong. Rec. 4746-4747 (1947) (remarks of Sen. Taft). The court of appeals would require a union-appointed trustee to advance the interests of the union against the employer and would thus return the administration of such funds to the arena of labor-management conflict.[17]

For these reasons, even prior to the enactment of ERISA in 1974, the lower courts had uniformly concluded that the trustees of funds established pursuant to Section 302(c)(5) owe their exclusive duty of loyalty to the fund beneficiaries and "do not act as representatives of either the employers or the union." *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967). See *United Marine Division, ILA* v. *Essex Transportation Co.*, 216 F.2d 410, 412 (3d Cir. 1954) (trustees are not "representatives of either union or employers"); *Blankenship* v. *Boyle, supra*, 329 F. Supp. at 1095 (Section 302(c)(5) is "designed * * *

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[17] Amax erroneously argues (Br. in Opp. 14) that Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501, supports its contention that a trustee of a welfare fund may simultaneously represent the interests of the employer or union. Section 501 provides only that a union official occupies a position of trust with regard to the union and its members. There is obviously no potential conflict of interest for a union official to act as both a collective bargaining representative and fiduciary for the same union. This case, however, does not concern whether a trustee of the fund may represent the fund beneficiaries. Rather, here the issue is whether the trustee of the fund, who unquestionably owes a fiduciary duty to the fund beneficiaries, may at the same time represent the potentially adverse interests of the employer.

to reinforce * * * the duty of undivided loyalty to the beneficiaries"). As the discussion below demonstrates, the enactment of ERISA explicitly confirms these principles.

3. *ERISA and the Multiemployer Pension Plan Amendments Act of 1980.* In 1974, Congress codified the strict common law fiduciary standards as applied to the trustees of all pension and welfare funds, including Section 302(c)(5) trusts. See 29 U.S.C. 1002(1) and (2); H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 296, 307 (1974). Part 4 of Title I of ERISA, which is not adverted to at all in the court of appeals' opinion,[18] unambiguously provides that every trustee must act solely on behalf of the trust beneficiaries and may not represent the interests of any other party, including an employer. Thus, Section 404(a)(1) of ERISA requires a trustee to "discharge his duties * * * *solely* in the interest of the participants and beneficiaries and * * * for the *exclusive* purpose of * * * providing benefits to participants and their beneficiaries * * *." 29 U.S.C. 1104(a)(1) (emphasis supplied).[19] Furthermore, Section 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are

[18] The Board's brief and petition for rehearing, as well as the amicus curiae submission of the Secretary of Labor in support of the petitions for rehearing in the court below, extensively discussed the ERISA issue.

[19] ERISA defines "participant" as "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * *, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). A "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8).

adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106 (b)(2). And Section 405(a) imposes an affirmative duty on each trustee to prevent every other trustee of the same fund from breaching their fiduciary duties, including their duty to act solely on behalf of the trust beneficiaries. See 29 U.S.C. 1105(a).

In addition, the fiduciary provisions of ERISA are specifically designed to insulate the administration of the trust from the employer's interests. Except in limited circumstances involving excess contributions and fund termination, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Section 403(c)(1), 29 U.S.C. 1103(c)(1). Similarly, Section 406(a)(1)(E) generally prohibits any transaction between the plan and a "party in interest," including an employer, and Section 407 strictly limits the amount and kinds of employer property and securities that the trustee may acquire on behalf of the trust. See 29 U.S.C. 1106(a)(1)(E) and 1107. See also 29 U.S.C. 1108 (authorizing certain exemptions).[20] Moreover, ERISA explicitly vests

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[20] Section 408(c)(3) provides that an officer, employee, agent or other representative of an employer or a union may serve as a fiduciary of a pension plan. 29 U.S.C. 1108(c)(3). Contrary to Amax's assertion (Br. in Opp. 15-16), that statute does not authorize a trustee once appointed to act as the representative for the appointing party in administering the trust. Rather, Section 408(c)(3) permits "[a] trustee of such a fund * * * [to] be the agent of the union [or the employer] *in other contexts*" and to discharge his different roles "in separate spheres." *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20 n.6, 21 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979). See also *Curren* v. *Freitag*, 432 F. Supp. 668, 672 (S.D. Ill. 1977). In fact, by

the "exclusive authority and discretion to manage and control the assets of the plan" in the trustees alone, and not in the employer or the union. 29 U.S.C. 1103(a).

The extensive legislative history of ERISA confirms what the unambiguous language of the Act makes plain: In administering an employee trust fund, a trustee may not represent the interests of the employer in any degree or fashion. Accord, *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3, supra*, 586 F.2d at 1375; *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20-21 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979); *Morgan* v. *Laborers Pension Trust Fund*, 443 F. Supp. 518, 530 (N.D. Cal. 1977). As Amax concedes (Br. in Opp. 14-15), ERISA incorporates the strictest common law fiduciary standards. See H.R. Conf. Rep. No. 93-1280, *supra*, at 295, 306; S. Rep. No. 93-127, 93d Cong., 1st Sess. 30, 33 (1973); H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 11-13 (1973); Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., II *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3370 (Comm. Print 1976) (hereinafter "*Leg. Hist. ERISA*"). The legislative reports further show that Congress rigorously tightened and supplemented those standards in order "to reduce substantially the potentialities for [fiduciary] abuse." [21] S. Rep. No. 93-383, 93d Cong., 1st Sess. 31

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its own terms, Section 408(c)(3) merely constitutes a clarification of Section 406 of ERISA, and does not exempt a trustee from the duty of exclusive loyalty set forth in Section 404(a). See 29 U.S.C. 1108(c)(3).

[21] At the same time, Congress provided new remedies for breaches of fiduciary duty including excise tax penalties and criminal punishment. See S. Rep. No. 93-383, 93d Cong., 1st Sess. 31-32 (1973).

(1973). See *id.* at 95, 97-106; H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 6 (1974); II *Leg. Hist. ERISA* 3370. In particular, Congress sought to prohibit trustees "from engaging in actions where there would be a conflict of interest with the fund, *such as representing any other party dealing with the fund.*" S. Rep. No. 93-383, *supra*, at 8, 32 (emphasis supplied). See *id.* at 104; S. Rep. No. 93-127, *supra*, at 46; H.R. Rep. No. 93-533, *supra*, at 13, 21; II *Leg. Hist. ERISA* 1726, 3378-3379, 3474, 3495; III *Leg. Hist. ERISA* 4562, 4759, 4803. In other words, the fiduciary responsibility provisions of ERISA are designed to prevent a trustee "from being put into a position where he has duel loyalties and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries" (H.R. Conf. Rep. No. 93-1280, *supra*, at 309)—precisely the "position" created by the decision below.[22] See also *Cutaiar* v. *Marshall*, 590 F.2d 523, 529-530 (3d Cir. 1979).

Finally, Congress amended ERISA in 1980 to foster "the maintenance and growth of multiemployer pension plans * * * [and] to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans." Section 3(c)(2) and (3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209-1210. See also pages 5 & 18-19, *supra*. This legislation imposes numerous new re-

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[22] In our view, the requirements of ERISA are fully consistent with the trust requirement earlier established in the LMRA. Insofar as there is any conflict between the two statutes, however, ERISA, which is a more recent and specific statute with regard to fiduciary duties, controls. See, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 618-619 (1980); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

sponsibilities upon trustees of multiemployer funds, and Congress reaffirmed that the trustees of such funds must continue to act solely on behalf of the trust beneficiaries and participants. See H.R. Rep. No. 96-869 (Part 1), 96th Cong., 2d Sess. 67 (1980). Indeed, the sponsors of the 1980 Act in both Houses of Congress expressly disapproved the decision of the court of appeals in this case, noting that pension fund trustees have no "obligations to the parties who appoint them," but rather must act "with the sole interest of the plan's beneficiaries in mind." 126 Cong. Rec. S10104 (daily ed. July 29, 1980) (colloquy between Sens. Randolph and Williams).[23]

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[23] The following colloquy occurred during the Senate debates (126 Cong. Rec. S10104 (daily ed. July 29, 1980)):

> MR. RANDOLPH. * * * If the chairman of the committee is agreeable, I wonder if I might address him to clarify a point which concerns me. Although this bill has added new and additional responsibilities of plan trustees, particularly under the reorganization provisions of the bill, is it not correct that this legislation reaffirms the present law, that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? My concern is based partly on a recent Court of Appeals decision, which I believe will be overturned on appeal, that apparently suggests that the trustee[s] have some obligations to the parties who appoint them. I do not believe that we in the Congress have ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers.
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> * * * * *
>
> MR. WILLIAMS. I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees

### B. Trustees Of A Section 302(c)(5) Employee Trust Fund Are Not Collective Bargaining Representatives Within The Meaning Of Section 8(b)(1)(B) Of The NLRA

The preceding discussion demonstrates that the trustee of an employee pension or welfare fund may not lawfully represent the interests of either the employer or the union in administering the trust. Even if the Court were to disagree with this contention, however, we submit that the decision of the court of appeals is wrong for still another reason. Whatever residual duty of representation a trustee may owe to the party that appointed him, a trustee of an employee fund cannot properly be characterized as a collective bargaining representative covered by Section 8(b)(1)(B) of the NLRA. Hence, the Union properly bargained to impasse and struck with regard to its proposal that Amax continue to contribute to

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must be made with the sole interest of the plan's beneficiaries in mind. That was, that is, and that will be.

Likewise, Representative Thompson stated (126 Cong. Rec. H7902 (daily ed. Aug. 26, 1980)):

> Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect congressional intent.

Congressional intent in amending ERISA is clearly relevant to determining the scope of its original provisions. See *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-194 (1967).

the miners' existing multiemployer pension and welfare funds.

1. Section 8(b)(1)(B) prohibits a union from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. 158(b)(1)(B). Thus, although Sections 8(b)(1)(B) and 302(c)(5) were both part of the 1947 Act, neither provision explicitly refers to the other.[24] Moreover, on its face, Section 8(b)(1)(B) does not apply to every kind of employer representative. Rather, as this Court concluded in *Florida Power & Light Co.* v. *IBEW, Local 641*, 417 U.S. 790, 803 (1974), "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." In other words, Section 8(b)(1)(B) is a narrow provision designed to protect employers from being forced into multiemployer bargaining units and to ensure the undivided loyalty of an employer's freely chosen representatives while they are engaged in collective bargaining and grievance adjustment. See 417 U.S. at 803-805; *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 422-423, 429-431, 435-436 (1978); S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 21 (1947); H.R. Rep.

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[24] Likewise, although the same congressional committees considered the issue of employee funds, multiemployer bargaining, and loyalty of employer representatives—the subject matter of Sections 8(b)(1)(B) and 302(c)(5)—, the legislative history is barren of any indication that Congress considered Section 8(b)(1)(B) to govern the employer-appointed trustees of Section 302(c)(5) funds. See also pages 39-40, *infra*.

No. 245, 80th Cong., 1st Sess. 14-17 (1947); 93 Cong. Rec. 3837, 4143 (1947) (remarks of Sens. Taft and Ellender), *reprinted in* II *Leg. Hist. LMRA* 1012, 1077.[25]

In administering an employee trust fund, an employer-appointed trustee is thus plainly not engaged in conduct regulated by Section 8(b)(1)(B). Even in the court of appeals' view, a trustee is primarily obligated to represent the trust beneficiaries and therefore cannot be loyal to the employer's interests or faithful to his orders. Although the trustees may confer with the collective bargaining parties and may consider their recommendations, such recommendations "are not binding or obligatory" upon the trustees. *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975). Instead, the trustees "have a duty to exercise their independent judgment in administering [the] trust funds." *Ibid.* See, *e.g.*, *Lamb* v. *Carey*, 498 F.2d 789, 793-794 (D.C. Cir. 1974); pages 21-33, *supra*. Indeed, the trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund" (*United States* v. *Carter*, 353 U.S. 210, 220 (1957)), and they lack discretion

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[25] The Senate Report defined with specificity the activities to which Section 8(b)(1)(B) was intended to apply (S. Rep. No. 105 (Part 1), *supra*, at 21):

> Thus, a union or its responsible agents could not * * * coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

to compromise such claims in order to benefit either the employer or the union (*Nedd* v. *United Mine Workers*, 556 F.2d 190, 210, 212-213 (3d Cir. 1977)). And in stark contrast to the relationship between a collective bargaining representative and an employer or union, a trustee is paid by the fund and not the appointing party, and he ordinarily may be removed only for cause.[26] Compare *Lamb* v. *Carey*, *supra*; G. Bogert, *supra*, at § 520; and II *Scott on Trusts* § 107.2 (3d ed. 1967); with H.R. Rep. No. 245, *supra*, at 17 (employer need not have as his collective bargaining representative "one whom, for *any* reason, he does not trust").[27]

Moreover, the trustees' exercise of discretion with regard to benefit eligibility and other similar matters (see Pet. App. 136a-137a; Amax Br. in Opp. 12-13) does not constitute collective bargaining or the adjustment of grievances under the collective bargaining agreement. Whereas collective bargaining and

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[26] The UMW trust agreement specifically provides that a trustee may be removed only for cause (A. 272).

[27] As the administrative law judge explained (Pet. App. 145a-146a):

> A primary attribute of individuals who act as bargaining representatives is that they owe undivided allegiance to the union or employer that appoints them and are bound to follow the instructions and act in the interest of their principals. The trustees involved in this case, however, are required by law and by the terms of the UMWA's proposed collective-bargaining agreement to act exclusively in the interest of the Funds' beneficiaries regardless of the consequences to the UMWA or the employers. The trustees are required to consider the recommendations of the employers and the UMWA in "a deliberate fiduciary atmosphere," not in the give-and-take atmosphere of the bargaining table. Moreover, the Funds' trustees differ in other crucial respects from collective bargaining representatives because of the fiduciary duty they owe to the Funds' beneficiaries. * * *

grievance adjustment concern the relationship between the employer and his employees (see, *e.g.*, *Keystone Steel & Wire Division* v. *NLRB*, 606 F.2d 171, 176, 179-180 (7th Cir. 1979)), the trustee primarily manages the fund assets and resolves eligibility questions between the independent trust and the beneficiaries, who may or may not be employees (*Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164-171 (1971)). And, in performing their discretionary duties, the fund trustees must act " 'in a deliberate fiduciary atmosphere' " (*Lamb* v. *Carey, supra*, 498 F.2d at 794), which is antithetical to the "horse trading," compromise, and economic pressures that characterize collective bargaining (see *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 495 (1960)). Furthermore, an employee trust is a distinct (and not necessarily coterminous) document from the collective bargaining agreement, and the termination and modification of trust funds are governed by different statutory provisions from those that govern the termination and modification of collective bargaining agreements. Compare 29 U.S.C. 1341 *et seq.* with 29 U.S.C. 158(d). In addition, Section 302(c)(5) provides for the compulsory arbitration of deadlocks among the fund trustees, whereas Congress rejected compulsory arbitration as a means of resolving collective bargaining disputes. Compare 29 U.S.C. 186(c)(5) with 29 U.S.C. 158(d); *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 218-219 (1979).

In sum, the trustees are administrators of an independent trust fund and their duties are wholly different from those of collective bargaining representatives. Indeed, on two occasions this Court has recognized the distinction between collective bargaining representatives and fund trustees. In *United States*

v. *Ryan*, 350 U.S. 299 (1956), the Court held that the word "representatives" in Section 302 of the LMRA is not limited solely to "exclusive [*i.e.*, collective] bargaining representative[s]." The Court pointed out that if Section 302 covered only collective bargaining representatives, "[p]ayments made * * * to other individuals as trustees [of employee welfare funds] would apparently be excluded from § 302." 350 U.S. at 305. More recently, in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 170, the Court, in concluding that there was no anomaly in considering retired workers as "employees" for purposes of Section 302(c)(5) but not for purposes of the bargaining obligation imposed by Section 8(a)(5), observed that "the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent." Accord, *NLRB* v. *Construction & General Laborers' Union Local 1140*, *supra*, 577 F.2d at 20-21; *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976); *Toensing* v. *Brown*, *supra*, 528 F.2d at 72; *Miniard* v. *Lewis*, *supra*, 387 F.2d at 865 n.5.

2. The decision of the court below that Section 8(b)(1)(B) precludes a union from bargaining to impasse and striking with regard to an employer's contributions to a multiemployer fund is wholly at odds with the history and policy of the labor laws. As indicated above (note 24, *supra*), nothing in the legislative history of the LMRA, which contained both Sections 8(b)(1)(B) and 302(c)(5), suggests that Congress intended Section 8(b)(1)(B) to cover the trustees of Section 302(c)(5) funds or otherwise to limit collective bargaining with regard to such funds. To the contrary, the legislative discussion regarding Section 302(c)(5) reflects Congress' understanding that employee funds are a mandatory subject of bar-

gaining. See, *e.g.*, I *Leg. Hist. LMRA* 485 (S. Rep. No. 105 (Part 2), *supra*, at 23 (Minority Report)), 798 (remarks of Rep. Lodge); II *Leg. Hist. LMRA* 1304-1306, 1311-1313 (remarks of Sens. Ball, Byrd, Pepper and Taft). In fact, despite extensive congressional discussion of, and opposition to, John L. Lewis' ongoing demands that each mining employer contribute to the UMW's existing welfare funds that covered numerous employers (see, *e.g.*, I *Leg. Hist. LMRA* 458 (S. Rep. No. 105 (Part 1), *supra*), 612, 672-673, 753 (remarks of Reps. Hartley, Fisher and Case); II *Leg. Hist. LMRA* 1305, 1311-1313, 1315 (remarks of Sens. Byrd and Taft)), Congress specifically rejected proposals that would have made the topic of pension and welfare funds a permissive subject of bargaining and would have prohibited all such funds that were even indirectly established or managed by a union. See H.R. 3020, 80th Cong., 1st Sess. §§ 2(11), 8(a)(2)(C)(ii) (1947), *reprinted in* I *Leg. Hist. LMRA* 39-40, 51; H.R. Rep. No. 245, *supra*, at 20-21, 29-30.

More recently, two subsequent legislative enactments have confirmed Congress' evident views on this point. In 1969, Congress amended Section 302(c) to permit the creation of trust funds for the purpose of scholarships and child care centers. See Pub. L. No. 91-86, 83 Stat. 133, codified at 29 U.S.C. 186(c)(7). Congress explicitly provided that these limited kinds of funds are not a mandatory subject of bargaining. See 29 U.S.C. 186(c)(7); H.R. Rep. No. 1370, 90th Cong., 2d Sess. 2, 4 (1968); H.R. Rep. No. 91-286, 91st Cong., 1st Sess. 3 (1969). No such provision governs the Section 302(c)(5) pension and welfare trusts at issue in this case, however, and, particularly in light of the legislative history described above, none should be implied.

The result reached by the court below would also frustrate the explicit congressional intent informing the 1980 amendments to ERISA. Section 3(a)(4)(A) of the 1980 Act states that "withdrawals of contributing employees from a multiemployer pension * * * adversely affect[s] the plan, its participants and beneficiaries, and *labor-management relations*" (94 Stat. 1209; emphasis supplied). Similarly, Section 3(c)(2) of the Act declares that it is the policy of the 1980 Act to encourage "the maintenance and growth of multiemployer pension plans" (94 Stat. 1209). The court of appeals, on the other hand, would preclude unions from bargaining to impasse and striking over multiemployer funds, thereby jeopardizing the creation of new multiemployer plans and the continued existence of established plans. See ABA *Labor Relations Law* 213-214 (1977).[28]

Finally, the reasonableness of the Board's conclusion that trust fund administration does not constitute "collective bargaining" within the meaning of the NLRA is confirmed by the fact that the contrary conclusion would thrust the Board "into a new area of regulation which Congress [has] not committed to it." *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 497; *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). For the first time, the discretionary actions of trustees in administering a fund

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[28] In this case, 1786 of the 2009 employers who contribute to the UMWA funds at issue are independent signatories and are not members of BCOA, which selected the employer trustee. A holding that Section 8(b)(1)(B) precludes mandatory bargaining over the multiemployer fund issue would thus provide more than 85% of the contributing employers with a non-bargainable veto over their employees' efforts to maintain the important benefits offered by the multiemployer plans. See pages 17-19, *supra*.

would be subject to the duty of good faith bargaining set forth in Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA, 29 U.S.C. 158(a)(5), 158(b)(3), and 158(d), and would become subject to the economic pressure that is an integral part of the process of collective bargaining under the NLRA.[29] Additionally, the duty owed to the trust beneficiaries might be diluted because a trustee would be regulated by the Board, the Secretary of Labor, and the courts, and would face the different and possibly conflicting duties imposed by Section 7 of the NLRA, Section 302(c)(5) of the LMRA, and ERISA.[30]

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[29] As Amax notes (Br. in Opp. 17), the Board has found the trustees of joint administered funds to be agents of the employers and the union for certain limited purposes. See, for example, *United Brotherhood of Carpenters, Local 1913 (Fixtures Unlimited)*, 213 N.L.R.B. 363 (1974), rev'd in pertinent part and enforced as modified on other grounds, 531 F.2d 424, 426-427 (9th Cir. 1976) (trustees required to accept contributions provided for under a Board back pay order); *Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (same); *Local 80, Sheet Metal Workers International Ass'n, (Turner-Brooks, Inc.)*, 161 N.L.R.B. 229 (1966) (trustees found to have helped enforce unlawfully obtained agreement of employer to contribute to an industry promotion fund). See also *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (employer violated Section 8(a)(5) of the NLRA by refusing to open his books to the trust as required by the bargaining agreement). As the Board pointed out in the instant case (Pet. App. 59a n.15), those decisions have no applicability to the trustees' " 'discretionary functions in the internal administration of the trust,' " which is at issue here.

[30] For example, Sections 405(a)(3) and 405(b)(1)(A) of ERISA require a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the employee beneficiaries. On the other hand, it is a violation of Section 8(b)(1)(B) of the NLRA for a union representative to interfere with the employer's collective bargaining agent's performance of his duties in accordance with the employer's

## CONCLUSION

The judgment of the court of appeals with respect to Amax's participation in the Union's pension and welfare funds should be reversed.

Respectfully submitted.

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instructions. *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., supra,* 437 U.S. at 436. Thus, if trust fund administration is "collective bargaining" as the court of appeals concluded, a trustee might well be found to have committed an unfair labor practice merely by fulfilling his obligations under ERISA.

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